

Australian Lawyers for Human Rights (ALHR) believes that all human rights should be protected in Australia at the federal level through the adoption of an Australian Bill of Rights. But until that until that day comes, it is essential for us to support and strengthen the reasonable protections from racial vilification contained in sections 18C and 18D of the *Racial Discrimination Act* (RDA).

**Australia is different from other first world democracies**

Human rights can only be enjoyed within any country through legislation which protects human rights – or which restricts activities that breach human rights, as does anti-discrimination law. Other countries’ laws and constitutions specifically protect human rights and the right to be treated with dignity and so those countries do not need specific anti-discrimination legislation. That is not the situation in Australia.

It is because Australia has no Bill of Rights that we need specific legislation to prevent the infringement of various human rights - and this is why we have Commonwealth anti-discrimination legislation including the RDA.

**Human rights work together, not apart**

No human right is absolute, or protected above all others in any of these countries, because rights can conflict. For example, the right to say what one wishes in public must be balanced against the right to be free from the harm that some kinds of public speech can cause.

This is why in Australia we have defamation and public offence laws, which can severely ‘chill’ public speech. And many types of speech, such as relating to migration issues or national security, are even criminalised in Australia today.

**What speech is captured by the RDA?**

In contrast, the speech restrictions in the RDA relate to a very narrow band of public speech. The restrictions in the RDA itself have been qualified even further by relevant court decisions.

To amount to speech which is captured by the RDA, Australian courts have held that the speech (which includes the communication of words, sounds, images or writing) meet ALL of the following requirements. It must be:

1. made in public
2. reasonably likely, in all the circumstances and on the balance of probabilities (when tested objectively by the likely effect on another person having the characteristics of the complainant’s group), to “offend, insult, humiliate or intimidate” another person or a group of people (the words in inverted commas are considered collectively and interpreted to mean that the speech must have ‘profound and serious effects, not to be likened to mere slights’)
3. done because of the race, colour or national or ethnic origin of the target person or of some or all of the people in the target group (whether or not that is the dominant reason: section 18B);
4. not done reasonably (in this and the following items, being an objective test) and in good faith (in this and the following items, being both an objective test and a subjective test requiring that the person acted more than negligently; courts have required something more akin to ‘culpable recklessness’ or ‘callous indifference’) in the performance, exhibition or distribution of an artistic work;
5. not done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;
6. not done reasonably and in good faith in making or publishing a fair and accurate report of any event or matter of public interest; and
7. not done reasonably and in good faith in making or publishing a fair comment on any event or matter of public interest (so long as the comment is an expression of a genuine belief held by the person making the comment).

**How is this type of speech regulated?**

Furthermore, under the RDA, speech which falls within that very narrow range by meeting every one of the above criteria is only required to be dealt with by the Australian Human Rights Commission (the “Commission”) if it is the subject of a complaint. If that occurs, the potential offence is required to be treated by the softest type of regulation: conciliation. The conciliation is carried out at no cost to the parties concerned.

**Is this an unreasonable process?**

If one protests that ‘the process is the cost’ and that Australia should have no legal or other process that is at all emotionally painful for participants, or which might injure their reputation, then conciliation under the RDA is a very poor example. Many much stronger examples spring to mind in all areas of life in which the required process is enormously more painful in both emotional and monetary terms. One can only conclude that the protestors believe that no impact at all should be experienced by those who breach the RDA prohibitions on racist public speech.

If a complaint is made to the Australian Human Rights Commission that particular public expressions or images fall within that narrow band covered by the RDA, then the Commission considers the matter. If it believes the complaint has some substance, it investigates further. If the complaint is found to be without substance, there the matter ends. Otherwise, the Commission attempts to bring the parties involved to a mutual understanding or conciliation. This might involve explaining how racist speech can be harmful.

**How does the RDA stand up against international law?**

The Full Court of the Federal Court in Toben v Jones held that the racial vilification provisions in the RDA were constitutionally valid on the basis that they were consistent with Australia’s obligations under *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) and the *International Covenant on Civil and Political Rights* (ICCPR).

Article 19 of the ICCPR refers to the importance of freedom of expression, but provides that the right to freedom of expression ‘carries with it special duties and responsibilities’ and Article 19(3) of the ICCPR places a clear limitation on the freedom of expression in relation to the respect for the reputation of others. The following article, Article 20, explicitly states that ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.

In addition:

* Article 26 of the ICCPR enshrines the right to be free from discrimination, (including racist discrimination)
* the Preamble to the ICCPR clarifies that all rights are about protecting "the inherent dignity of the human person” (which would be diminished by racist speech)
* Article 17(1) of the ICCPR enshrines the right to protection from attacks on honour and reputation
* Article 4 of the ICERD requires State Parties to criminalise all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any racial or ethnic groups.

ALHR believes that international law:

* requires Australia to prohibit racial hatred and discrimination by federal legislation, and
* confirms that such legislation is a legitimate restriction on freedom of speech.

“As with the interpretation of all laws”, says ALHR President Benedict Coyne, “it is important to read both the RDA and relevant international treaties in their entirety in order to properly understand their application in the real world of a multiplicity of rights, some of which are sometimes competing rights and which need to be adequately balanced. In our view the RDA, as presently drafted, appropriately reflects the balances drawn by international treaties and law.“

**Why sections 18C and 18D of the RDA are so important for Australia**

“Respect for the equal dignity of all human beings constitutes the foundations of a democratic, pluralistic society,” says ALHR President Benedict Coyne.

“It may be necessary in democratic societies to restrict forms of expression which spread, incite, promote or justify hatred based on intolerance. Sections 18C and 18D of the RDA achieve this.”

“In limiting a narrow range of harmful speech, the RDA accords with the famous quote by Benjamin Franklin from nearly three centuries ago, quoted by Justice Bromberg in the *Eatock v Bolt* judgment, establishing that the right to freedom of speech can only ever be a qualified right:

*WITHOUT Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as public Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or control the Right of another.*

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